US MANAGEMENT SDN. BHD.

v.

MADINA ENTERPRISES & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-22-1189-1991]
7 NOVEMBER 1991

CIVIL PROCEDURE: *Restraining order - Conditional upon security deposit - Protection vide undertaking denied - Non compliance of term of order.*

On 6 September 1991 the Court granted the plaintiff a restraining order against the 2nd defendant a foreigner preventing him from leaving the country unless he has deposited a sum of US$1,250,000 and the 2nd defendant to deliver his international passport to the person serving the order, with the Court and conditional upon the plaintiff's undertaking to abide any order to the Court in respect of damages the Court may find the 2nd defendant to have suffered due to this order on an *ex-parte* application of the plaintiff.

On 19 September 1991 the order was amended to include a clause directing the relevant authorities to take into custody the 2nd defendant should he attempt to leave the country without complying with the term in the order dated 6 September 1991.

On 15 October 1991 the defendants by *ex-parte* applied for and were granted an injunction restraining the directors of the plaintiff from disposing their assets or leaving the country without depositing the sum of US$1,499,000 with the Court and plaintiffs directors international passports be handed over to the defendant solicitor. The plaintiffs directors were given the liberty to apply to set aside the said order. Subsequently an amendment to deposit with the Court a sum of RM50,000 as security against any damages the Court may find the plaintiff to have suffered by this order was added.

To enable the defendant to deposit the security deposit the *ex-parte* order dated 6 September 1991 was varied as reflected in the amended order dated 15 October 1991 obtained by the defendant.

On 16 October 1991 the defendants' solicitors applied to the Court for an order that the plaintiff furnish a bank guarantee of RM50,000 to which the plaintiff's solicitors agreed the order dated 6 September 1991 was accordingly varied to reflect the same.

On 25 October 1991 upon being questioned by the plaintiff's solicitors, the defendants' solicitor confirmed that the security deposit of RM50,000 had been made.

On 28 October 1991 the plaintiff's solicitors deposited a sum of RM50,000 only with the Court.

On 9 November 1991 upon resumption of the hearing of the matter, the plaintiff's solicitors informed the Court that the defendant has deposited US$18,500 with the Court on 6 November 1991.

Held:

[1] The order dated 15 October 1991 was conditional upon the defendants depositing with the Court RM50,000. The condition had not been complied with until 6 November 1991. In view of this, the injunction obtained by the defendants on 15 October 1991 should not be allowed to continue.

[2] The security deposit was a condition upon which the injunction was granted. The defendants' solicitors in this case have failed to explain to the Court the long delay (22 days) in depositing RM50,000 but instead led the Court to believe the same has already been deposited on 25 october 1991.

[Defendants ex-parte amended order dated 15 October 1991 set aside with costs, without going into the merits.]

Cases referred to:

Spanish General Agency Corp. v. Spanish Corp. Ltd. [1890] 63 LT 161 ***(foll)***

Commodity Ocean Transport Corp. v. Basford Unicorn Industries Ltd. [1987] 2 Lloyds Report 197 ***(foll)***

For the plaintiff - M. Nagarajah; M/s. Shook Lin & Bok

For the defendant - P.C Low; M/s. P.C. Low & Associates

JUDGMENT

Zakaria Yatim J:

On 6 September 1991, on the application of the plaintiff, the Court granted an order restraining the 2nd defendant, who is a foreigner, from leaving Malaysia until he deposited a sum of US$1,250,000 with this Court or in lieu thereof until the 2nd defendant furnished an irrevocable local demand bank guarantee/undertaking to this Court to the sum of US$1,250,000 is complied with. It was also ordered that the 2nd defendant deliver his international passport to the person serving the order for safe custody with the plaintiff's solicitors until full compliance of the order. The order was made on the plaintiff's undertaking to abide by any order this Court may make as to damages in case in the event this Court finds that the 2nd defendant sustains damages by reason of this order.

On 19 September 1991, the plaintiff filed a 2nd *ex-parte* application, and the Court made an order, which states that -

> ...in the event that the 2nd defendant leaves or attempts to leave the Federation of Malaysia, any or all the relevant authorities including any police officer and/or immigration officer do and is hereby directed to forthwith take the 2nd defendant into custody until compliance by the 2nd defendant of the order dated 6 September 1991...

On 15 October 1991, the defendants filed an application by summons in chambers seeking the order of the Court, *inter alia*, to restrain the directors of plaintiff namely, Mr. Joseph Michael Warren and Mr. Hamid Ibrahim Aly from disposing their assets and to restrain them from leaving this country until a sum of US$1,499,000 is deposited by them with this Court. The defendants also asked that their international passports be handed over to the defendants' solicitors.

On the same day, I made an *ex-parte* order in the following terms:

> Upon the application of Madina Enterprise and Mansor Al-Dahlawi the defendants abovenamed in this action and upon reading the *ex-parte* summons in chambers and upon Reading the affidavit of Mansor Al-Dahlawi affirmed on 15 October 1991 and filed herein And Upon Hearing Mr. Low Pooi Chai of for the defendants abovenamed and subject to the defendants' by their undertaking: (a) to abide by any order this Court may make as to damages if it shall consider that the plaintiffs shall have sustained any damages by reason of this order which the defendants ought to pay; (b) to obey any order of this Court may make as to the damages if it shall consider that any innocent parties other than the plaintiffs shall have

sustained any damages by reason of this order which the defendants ought to pay; and (c) to pay the reasonable costs incurred by any person other than the plaintiffs to whom notice of this order may be given in ascertaining whether any assets to which this order applies are within their power possession custody or control and in complying with this order and to indemnify any such person against all liabilities which may flow from such complieance. It Is hereby ordered that the plaintiff, Joseph Michael Warren and Hamed Ibrahim Aly, the directors of the plaintiff's company be restrained by themselves their servants or agents until further order from: (i) disposing of or charging or diminishing or causing or procuring or permitting the disposal transfer charging or dimunition or in any way howsoever dealing with any of their respective assets monies or goods whereever situated (ii) doing or authorising the doing of the following acts or any of them that is to say removing from the jurisdiction of this Court or disposing of or dealing with their assets within the jurisdiction of this Court in particular the property and assets of the business known as US Management Sdn. Bhd. carried on at the plaintiff's premises at 25.1A, 25th floor Menara Haw Par, Jalan Sultan Ismail, Kuala Lumpur and the monies in the Standard Chartered Bank at Jalan Ampang Kuala Lumpur whether such assets be their own names or jointly with any other person(s) or in the names of nominees or trustees for the plaintiff and/or the directors save and insofar as the said assets of the plaintiffs and/or its directors does not exceed the sum of US$1,449,000 and provided that nothing herein shall prevent any bank from exercising any rights of set-off it may have in respect of facilities afforded by any such bank[s] to the plaintiffs and/or its directors or any of them prior to the date of this order and it is further ordered that the plaintiffs and/or Joseph Michael Warren and Hamed Ibrahim Aly do forthwith disclose the full value of their respective and joint assets within and without the jurisdiction of this Court identifying with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own names or nominess or otherwise on their behalf and the sums standing in such accounts such disclosure to be verified by affidavits to be made by the plaintiff, Joseph Michael Warren and Hamed Ibrahim Aly and serve on the defendants' solicitors within 4 working days after service of the order or notice thereof given and it is further ordered that Joseph Michael Warren and Hamed Ibrahim Aly be and is hereby restrained from leaving the Federation of Malaysia until further order of this Honourable Court or until a sum of US$1,449,000 is deposited with this Honourable Court and it is further ordered that the said Joseph Michael Warren and Hamed Ibrahim Aly do forthwith deliver up their international passports to the person who shall serve this order upon them for safe custody with the defendant's solicitors until further order of this Honourable Court and it is further ordered that in the event the said Joseph Michael Warren and Hamed Ibrahim Aly leaves or attemps to leave Malaysia, any or all relevant authorities including any police officer, immigration officer, officers from the Home Affairs Ministry and officers from the Foreign Affairs Ministry do and is hereby directed to forthwith take the said Joseph Michael Warren and Hamed Ibrahim Aly into custody until compliance by them of the orders made herein or until such further order of this Honourable Court and it is further ordered that in determining the identity of the said Joseph Michael Warren and Hamed Ibrahim Aly, the relevant authorities may have recourse to the assistance of the defendants and/or its officers, servants and/or agents and it is also ordered that the plaintiff, Joseph Michael Warren and Hamed Ibrahim Aly be at liberty to apply to set-aside this order and that the costs of and/or incidental to this application be costs in the cause.

The above order was subsequently amended in compliance with the original order I made in chambers by inserting at p. 2 of the order the following words: "... To deposit with this Court in the sum of RM50,000 ..." so as to abide by any order of this Court as to damages if the Court later finds that the plaintiff suffers damages by reason of the order obtained by the defendants. To enable the defendants to deposit the bank guarantee I varied the *ex-parte* order made on 6 September 1991. This is reflected in the amended order dated 15 October 1991 obtained by the defendants.

On 16 October 1991, at the commencement of the hearing of the defendants' application to set aside the *ex-parte* order obtained by the plaintiff on 6 September 1991, Mr. P.C. Low applied to the Court for an order that the plaintiff also furnish a bank guarantee of RM50,000. This was agreed to by Mr. M. Nagarajah, Counsel for the plaintiff. I accordingly ordered that the order dated 6 September 1991 be varied as follows:

> In lieu of the undertaking as to damages the plaintiff is to furnish to the Court a bank guarantee in the sum of RM50,000.

On 28 October 1991, the plaintiff's solicitor deposited with the Court a bank draft in the sum of RM50,000.

At the continued hearing of the application on 25 October 1991, Mr. Nagarajah raised the issue of bank guarantee in the sum of RM50,000 to be furnished by the 2nd defendant pursuant to the order of the Court. He said that although the order did not specify a time limit during which the bank guarantee was to be furnished the 2nd defendant must comply with the said Court order. Mr. P.C. Low replied, "I have made arrangement with my client and it is already in the bank." When the Court resumed hearing after the lunch break, Mr. Nagarajah again asked whether the 2nd defendant had made the deposit. He said "Have the deposit been made?". Mr. P.C. Low replied "Yes".

This morning when the matter came up for hearing again, Mr. Nagarajah informed the Court that the 2nd defendant deposited a bank guarantee with the Court for the sum of US$18,500 only yesterday afternoon, he said:

> On the morning of the 25th when the Court enquired about the deposit he (Mr. P.C. Low) informed us that the deposit is on the way and gave his personal undertaking to make the payment by the afternoon of that day and towards the end of the sitting in the afternoon when the issue was brought up again he informed the Court that the money had been paid into Court. I am informed that no such payment was made on the 25th and payment was only made yesterday afternoon by way of bank guarantee for a sum of US$18,500.

Mr. P.C. Low denied that he gave any personal undertaking that the money was to be furnished to the Court on 25 October 1991. He said, "I do not think I have given a personal undertaking that the money will be paid into Court".

What Mr. P.C. Low has said this morning is not quite correct and contrary to what he said on 25 October 1991. When I made the order dated 16 October 1991 it was conditional upon the defendants depositing with this Court a bank guarantee in the sum of RM50,000. That condition had not been complied with until yesterday, that is 6 November 1991. In the circumstances, the injunction obtained by the defendants on 16 October 1991 should not be allowed to continue.

In *Spanish General Agency Corp. v. Spanish Corp. Ltd.* [1890] 63 LT 161, an *ex-parte* injunction was obtained by the plaintiffs shortly before 2.00 O'clock on a Saturday afternoon on condition that a party should be added as plaintiff for the purpose of his giving on his behalf the usual undertaking as to damages. The writ was not amended until the following Tuesday morning whilst a motion was being made to dissolve the injunction. The Court dissolved the injunction without deciding the merits, on the ground that the plaintiffs had not fulfilled the terms on which the injunction was granted and had thereby left the defendant without the protection of the undertaking as to damages.

In *Commodity Ocean Transport Corp. v. Basford Unicorn Industries Ltd.* [1987] 2 Lloyds Report 197, Hirst J in his judgment at pp. 199 and 200, said:

When such security is originally sought it is sought as a condition for the grant of the injunction, in other words, the plaintiff is told: 'If you want this injunction you have got to pay the price by fortifying the undertaking as to damages'. The plaintiff can then either agree or disqualify himself from obtaining the injunction.

In the present case the bank guarantee was deposited with the Court twenty-two days after the *ex-parte* order was obtained by the defendants. No good reasons have been given by the defendants as to why there was such a long delay. Instead, the defendants' solicitors led the Court to believe that the bank guarantee was deposited with the Court on the afternoon of 25 October 1991.

For the reasons I have already stated and in view of the authorities cited above, I order that the *ex-parte* order obtained by the defendants on 15 October 1991 and the amended order obtained on the same day be set aside with costs without going into the merits.

Also found at [1992] 2 CLJ 1088